

The Historical and Traditional Features of the Malaysian Constitution

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It was in the late 18th century that the word constitution first came to be identified with a single document, mainly as a result of the American and French revolutions. The political significance of the new concept of constitutions was stressed by the radical Tom Paine:

A constitution is a thing antecedent to a government and a government is only the creature of a constitution.... A constitution is not the act of a government but of a people constituting a government; and government without a constitution is power without a right.¹

In the vast majority of modern states or political societies there exists an identifiable document, or a group of document called the constitution which sets out the framework of government, postulates how it ought to operate and makes declarations about the purposes of the state and society and the rights and duties of citizens; and in addition to that provide sanctions against violation of particular provisions of the constitution.²

The making of a constitution may not necessarily be logically suggested by the history of a state. In Malaysia, nevertheless, history played its parts in terms of bequeathing a legacy that has influenced the making of the constitution. The Malaysian constitution is the product of political, economic and social development which were to remain crucial reference parts in the evolution of Malaysian political life and later became a national heritage. Provisions which deals with machinery of government, parliamentary supremacy, judiciary and matters pertaining to citizenship are considered to be the product of the colonial rule. If these provisions are excluded, thus a substantial number of remaining provisions can be described as 'traditional' and 'historical' in the sense that these matters have been in practice long before the British colonial administration itself. Furthermore, it has passed through several successive, constitutional and political developments but was still retained in the present constitution although rule on sovereignty of rulers has undergone several changes but still preserved subjected to the 1993 constitutional amendments recently. Its framers and drafters must have thought that these traditional elements were essential for the stability and progress of the country and had a prominent role in the mechanics of the constitution. These elements can be summarized as:

1. sultanate or position of the Malay rulers
2. issues on the Islamic religion
3. the Malay language
4. and matters concerning Malay privileges.

This paper will make an attempt to highlight certain aspects of these historical and traditional features and to discuss their role and position in the Malaysian constitution.

POSITION OF RULERS/SULTANATE

Malay kinship can be traced to the hindu period. It is during the Malacca period that the Malay kinship was at its peak. The apex of the state as a political unit was its ruler who was drawn from a royal patrilineage and invested with attributes of supernatural power and dignity. The function of the royal ruler were to exercise the limited power of central government, to conduct external relations, to provide leadership in foreign wars and to embody and symbolise the unity and welfare of the state.³

During the British colonial period four states, Selangor, Pahang, Negeri Sembilan and Perak as contrasted with the Straits settlements were examples of indirect rule. The advantages of indirect rule for the ruling colonial power include cheapness and for the ruled, a softening of the impact of colonialism.⁴ The Sultan were always accepted by the British as sovereign Rulers⁵ and had complete power within their respective states, although they were required by a series of treaties with Great Britain to accept the advice of British officers whom is designated as British Residents or Advisors. A common clause which can be found in these treaties are those found under the Treaty of Federation 1895:

Clause 4: The above named rulers agree to accept a British Officer, to be styled the Residen General as the agent and representative of the British government under the government of the Straits Settlement. They undertake to provide him with suitable accommodation with such salary as determined by Her Majesty's government and to follow his advice in all matters of administration other than those touching the Mohammadan religion. The appointment of the Resident - general will not affect the obligations of the Malay rulers towards the British Residents now existing or to be hereafter appointed to offices in the above mentioned protected states.

These treaties acted as modes of colonization of the Malay states i.e through intervention. The British need the power to rule the states. On the other hand they also recognised the usefulness of the Rulers and the sensitivity of the subjects regarding the position of their rulers and the loyalty of, the subjects to them. "Muhamedian religion" were interpreted to refer only to ceremonies, rituals and personal law. By accepting a British

Resident, the state concerned⁶ agreed to the appointment of a British officer whose advice must be followed in all matters except Malay religion and custom. The states undertook that they would have no dealing with other foreign powers except through Britain. In return, Britain promised protection against external threats. Each constituent state will continue to be administered by the Resident who was ultimately responsible to the Resident General Great Britain protectorate over the Malay state does not amount to full rights of property or sovereignty but is good against other civilised states so as to prevent occupation or conquest by them and so as to debar them from maintaining relation in the protected states. It differs from a colony in that the protected do not form an integral portion of the territories of Great Britain.⁷

In theory the latter worked under the direction and control of the colonial government. To the extent that there was some independence and sovereignty of the states and Malay Rulers, it was merely a fiction. They were under the obligation to adhere to the advice of the Residents in all matters except Malay religion and culture. The conference of Malay Rulers as established was some measure of recognition of participation by the Malay rulers in government. This situation continued until the eve of independence. In 1947, the British Government introduced a unified constitution for Peninsular Malaysia, called Malayan Union.⁸

Under this constitution, the British has redefined their powers over the Malay states. This is done through the setting up of various council by the power authorized by the Malayan Union Order in Council 1946. Examples are the establishment of legislative Council,⁹ the Council of sultans,¹⁰ the state and settlement council¹¹ and the establishment of sultans advisory council.¹² Under clause 16(2) the governor was appointed as head of the legislative council and his powers of jurisdiction could include:

Clause 5: empowered and commanded to do all things that belong to his said office in accordance with this order and such commission as may be issued to him under his majesty's sign manual and signet and according to such instruction as may from time to time be given to him under his majesty's sign manual and signet or through a secretary of state and such orders in council and other laws as may from time to time in force in the union.

Furthermore, the governor is empowered to make laws for the peace, order and good government of the union.¹³ On behalf of the Sultan, the council of Sultan was set up.

According to clause 40, the function of the council includes:

- a) to consider legislation relating solely to matters of Mohammedian religion, which the Sultan's Advisory Council in any state has approved for enactment and

- b) to advise the governor on any matter which he may refer to the council for discussion and on any matter which any sultan may propose for discussion.

In addition, under clause 40(2), every bill relating solely to matters of Muhamedian religion approved by a Sultan's advisory council in any state under this order shall after submission to the council of sultans be referred to a committee called "Muhamedian Legislation Committee".

Legally, these provisions has in effect reduce the powers of Sultans to matters on personal and religious jurisdiction. Even in aspects on customs and religion, references must be made to a committee which was appointed by the governor.

The Malayan Union scheme had been hatched in London during the war.¹⁴ Some of the ideas behind it were laudable; the desire to create a Malayan state as a prelude to creating a Malayan consciousness and a wish for greater centralization and efficiency. However some proposal accompanying the unification plan were objectionable to the Malays notably those on citizenship and civil service positions.¹⁵ The Malayan Union is a landmark in the history of Malay politics in that 1946 was the birth of concerted Malay nationalism in the founding of the United Malay National Organisation (UMNO). After this failure, the British had to find a more acceptable political arrangement. By then British attitude had changed considerably; the Malay rejection of the Malayan Union served a caution that this hostility and lack of cooperation could degenerate into a completely anti-British attitude. As a result of the protest and opposition by the Malays the Malayan Union constitution called the federation of Malaya Agreement 1948 was introduced.¹⁶ This constitution more or less restored the position of the Malay rulers to their status quo.

When independence was eventually granted to peninsular Malaysia the constitution of rulership was simply continued but with some modification in order to bring it in line with the concept of parliamentary democracy and independence. Thus instead of being obliged to accept British advice, the rulers have now to accept the advice of their ministers and to act accordingly. The Supreme Head of the Federation is the Yang di Pertuan Agong, (YDPA) who is a ruler chosen from among the existing Rulers of the 9 Malay States by means of election.¹⁷ In the case of Yang di Pertuan Agong, he has to act on the advice of the cabinet¹⁸ and in the case of the Ruler of a state he is to act on the advice of the Executive Council. The Federal constitution also states down the powers of Yang di Pertuan Agung in specific matters. For example:

Art 40(2) of the Federal Constitution states that The YDPA may act in his discretion in the performance of the following function, that is to say:

- (a) the appointment of a Prime Minister.
- (b) the withholding of consent to a request for the dissolution of Parliament.
- (c) the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, positions, honours and dignities of Their Royal Highnesses, and any action at such a meeting and
- (d) many other case mentioned in this constitution.

Similar provision, with necessary modifications are to be found in the State Constitution. Thus in para (a) the word 'Prime Minister' should be read as 'Menteri Besar' and in para (b) 'Parliament' should be read as 'Legislative Assembly'.

However, the various State Constitution¹⁹ contain the following additional provision as to the Sultan's discretionary powers:

- i) any function as head of the Muslim religion or relating to the customs of the Malays.
- ii) the appointment of an heir or heirs Consort, Regent or Council of Regency.
- iii) the appointment of person to Malay customary ranks, titles, honours and dignities and the designation of the functions appertaining thereto and
- iv) the regulation of royal courts and palaces.²⁰

As a consequence of adopting constitutional monarchy, the YDPA is vested with the executive authority of the Federation but as a constitutional ruler he is to act on the advice of his cabinet or Minister authorised by the Cabinet.²¹ He is also Supreme Commander of the Armed Forces of the Federation²² and has power to grant pardons, reprieves and respites etc to persons convicted by courts-martial and of offences convicted within the Federal Territory of Kuala Lumpur.²³ He is one of three constituent elements which make up the Federal Legislative, i.e. Parliament.²⁴ As the Supreme Head of the Federation, he has power to make important appointments not only under the constitution²⁵ but also under Acts of Parliament.

In the state constitution, the Sultan is the Head of his state on whom the executive authority of the state is vested although the authority has to be exercise on the advice of his Executive Council or his Chief Minister.²⁶ He has the power to grant pardons, reprieves and respites to those who have been convicted of the commission of offences within his state.²⁷ He has powers of making appointments under the state constitution and state law.

To provide a good relationship the constitution make provisions for the YDPA and all the Rulers and governors to meet frequently. This is made possible by the setting up of a body called the conference of Rulers which has permanent secretariat headed by an official with the style of 'keeper of the

Rulers Seal". The idea of the setting of the Conference of rulers started from the Malayan Union Constitution which established the Council of Sultan.²⁸ Although the union was dissolved, the idea was not abandoned but continued by the Federation of Malaya Agreement 1948 by the setting up of the Conference of Rulers under that Constitution.

The members of the Conference of Rulers may act in their discretion in any proceedings relating to the following function:

- a) the election or removal from office of the YDPA or the election of the timbalan YDPA
- b) the advising on any appointments;
- c) the giving or withholding of consent to any law altering the boundaries of a state or affecting the privileges, position, honours or dignities of the ruler or
- d) the agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the federation as a whole.²⁹

Finally, no discussion on monarchy is complete without referring to their sovereignty and immunity. There has been a tremendous change pertaining to sovereignty of rulers as a result of the 1993 amendments to the constitution. Prior to these amendments, the Constitution³⁰ provides that the YDPA shall not be liable to any proceeding whatsoever in any Courts. As regards of the Rulers, their sovereignty, prerogative powers and jurisdiction remain unaffected and no proceeding whatsoever shall be brought in any court against the Ruler of a state in his personal capacity. This has been illustrated through the case laws as early as 1894. In *Mighell v. Sultan of Johore*³¹ the plaintiff brought an action to claim compensation for breach of contract against the defendant. The defendant in fact was the Sultan of Johore who went to England and took the name of Albert Baker. The plaintiff believed that his name was Albert Baker. He also deceived her by pretending to be Albert Baker, promised to marry her and later broke his promise. The court of appeal held that it has no jurisdiction to enter into any inquiry into the matters alleged by plaintiff since the defendant is an independent sovereign and has a right of immunity against any proceeding.

Thirty years later, the same principle was followed in *Duff Development Co. Ltd v. Kerajaan Negeri Kelantan & Anor*.³² In this case the government of Kelantan granted to the appellant company certain mining and other rights to be exercised in that state. Later disputes arise as to the effect of the deed which was then referred to an arbitrator who made an award in favour of the company and directed the government to pay the cost of the arbitration. The government then applied to the Chancery Division to set aside the award but the application was refused. The company then obtained from the King's Bench Division an order giving leave to enforce the award but the order was set aside on the application of the government on the ground that Kelantan

was a sovereign Independent state. Thus the company appeal to the House of Lord but the appeal was dismissed on the ground that the court has no jurisdiction for the purpose of the proceeding to enforce the award since the defendant has the immunity from any judicial process.

The principle was also affirmed in *Pahang Consolidated Co. Ltd v. State of Pahang*³³ which held that an action for damages for breach of covenant would within the meaning of section 5 of The Tin and Tin-Ore (Restriction) Enctment 1931 which states that "no suit shall be constituted in any court against the chief secretary to government or against the government of the Federated Malay states or of any of them or against any public officer in respect of any matter or thing arising under or resulting from the operation of the enactment".

Thus the legal implication would be the suit thereunder could not therefore be maintained.³⁴

In 1983, action was taken to amend the Constitution so that, the power of the YDPA to reject Bills passed by Parliament would be nullified. This effort succeeded but not in its entirety. Eventually, it was decided that the power would be reduced through a provision that allowed his Majesty to refer back any Bills to Parliament if he was unwilling to give his assent to them. Should the Parliament pass these Bills again, with or without amendment, the Bills would become law within 30 days³⁵ even if the king did not sign them. However this was restricted to matters that did not touch the rights of and privileges of the royalty. Any amendments to constitutional provisions relating to the royalty would require the agreement of the council of Rulers. No amendments were made to the State Constitution. At such, there are no laws that may be passed without the Ruler's signature. This means that the Ruler's power at the state level is higher than that of the state Assembly which represents the people.

THE 1993 AMENDMENT TO THE FEDERAL CONSTITUTION

The 1993 amendments are intended to prevent or stop hatred against the Rulers from escalating, which could lead to demands for the abolition of the Royalty. The amendments are to save the Rulers themselves and the system of constitutional monarchy. To further strengthen the constitutional provisions that perpetuate the system of monarchy, a provision is made that any resolution or proposal to abolish the monarchy will be deemed to be seditions and subjected to the seditions Act. The amendments do not touch on the priviledges given to the rulers. The Rulers will continue to be recognised as such, and the priviledges made available by the constitution and laws to Ruler and Royal Families will be retained.

To ensure that the constitutional monarchy is truly effective, three amendments are made to the provision relating to the immunity given to the

rulers.³⁶ This means legal action cannot be taken against the Rulers in the course of his official duty. The Malaysian Prime Minister, Datuk Seri Dr. Mahathir during tabling the bill of these amendments at the Parliament House emphasised that these amendments did not affect the sovereignty of Rulers.³⁷ He made a comparative study with the constitution provisions of Spain, Belgium, Norway, Denmark, Sweden and Luxemborg which all the countries give immunity to the Ruler only in the course of his official duty. (The responsibility for) any offence in the course of his official duty will be borne by the government or minister. There is no special provision in any Constitution of European Countries which gives immunity to the ruler in his personal capacity. Still, the rulers of these countries are recognised and honoured. They have not lost their sovereignty. It is only in the Malaysian constitution that makes special provision under Art. 181(2) that "no proceedings whatsoever shall be brought in any court against the Ruler of a state in his personal capacity."

In legal terms, this would mean that a Ruler could commit murder without any action being taken against him. The effect of Article 181(2) is indeed wide. Since the Federal and State Constitutions are also law in effect, Article, 181(2) actually allows a ruler to contravene the Constitution. This is why, when a Ruler is involved in business despite this being prohibited by the Constitution, the government cannot do anything about it. The YDPA also cannot be charged in any court of law. However, the Council of Rulers is empowered to strip him of his position. In the case of the rulers however, they are protected by Art 181(2).

Thus, Art 181(2) was amended to include the provision as follows:³⁸

Art. 181 Clause(2) No proceeding whatsoever shall be brought in any court against the Ruler of state (in his personal capacity) except in the Special court established under Part XV.

To ensure the effectiveness of the removal of immunity, two more constitutional provisions were amended. The first relates to the provision in Art. 63(2) which protect anyone taking part in any debate in Parliament on the state Exco from being questioned in court, is amended under Article 63(4) if he touches on provisions of the Sedition Act.³⁹ Legally, this would mean that criticism against a ruler could be made before 1971 without affecting his sovereignty. Therefore, allowing the people to criticize Rulers who do wrongs does not tantamount to the denial of the Rulers rights and original privileges.

The amendment to Art 63 after sub-section (4) is as follows: (ie (Art 63/5)

Art 63(5): whatever the provision of subsection (4) no one is liable to any proceedings in any court in connection with whatever he says about the YDPA or any Ruler while participating in any proceedings in any session of Parliament or in any committee

unless he proposes the abolition of the constitutional position of YDPA as the head of the nation as far as the federation is concerned and the constitutional position of the ruler of the state, as the case may be

Article 72 is amended by inserting the following after sub-section (4):

(5) notwithstanding clause (4), no one is liable to any proceedings in any court in connection with whatever he says about the Ruler of any state while participating in any proceedings of the State Assembly of any state or of any state Exco unless he advocates the abolition of the position of any Ruler as the constitutional head of the state”.

The other amendment would include on right to bestow pardon as specified in Article 42. According to Art. 42, a Ruler could pardon himself should he be found guilty in a court of law. Thus if Art 42 is not amended, the Rulers can still commit liability and offences, trial by a court and yet be given a pardon. A new provision was inserted in Article 42 which confers the power of pardon to the Yang diPertuan Agong but it can only be exercised subjected on the advice of the Pardon Board⁴⁰ A clear example of this misdemeanour was illustrated in the case of *Public Prosecutor v. Tengku Mahmood Iskandar Anor*.⁴¹ This would then render the abolition prior to this to be meaningless and ineffective. Hence Article 38 and 42 of the Federal Constitution were amended and with these amendments, a ruler ‘may not hear appeals on his own behalf, nor may be pardon himself. Should a ruler or his consort seek pardon, the Conference of Rulers will hear and decide the case. The legal effects of the ammendments also include that a Ruler may not hear an appeal for or pardon his children personally. The Conference of Rulers will elect another Ruler to hear and decide the matter on his behalf. With the abolition of the immunity of Rulers from legal action, except in the performance of official duties, it is believed that Rulers will refrain from engaging in actions for which they can be charged in court.

Finally, in addition to the amendments mentioned above, two new provision, Article 182 and Article 183 was introduced. Article 182 relates to matters pertaining to the structure, appointments, jurisdiction, proceedings and the status of the decision made by a special court.⁴² This special court has the jurisdiction to impose penalties to the rulers and thus at the same time prevented them from being trialed by a special court. In addition to that, Article 183 was inserted which stipulates that no action can be brought against the Yang diPertuan Agong or a Ruler except with the consent of the Attorney General personally. As far as the amendments on the sovereignty of rulers are concerned, they have come along way from the legal position given to them from the treaty of federation 1895 but whatever legal setbacks and issues on constitution crises that these amendments have created, the main objective still remain that all the changes was moved to safeguard the rulers dignity and integrity among the people and thus still preserving the traditional and historical element of Malay rulers in the constitution.

THE ISSUES ON THE ISLAMIC RELIGION

The provisions of the Constitution on Islamic religion is another traditional element and its development is traced back from the early history of Malay states. Religion is always identified with race so as it is fundamental to the Malay thought that the religion of Islam is an essential element in the legal constitutional definition of "Malay". The Federal Constitution⁴³ defines a Malay as person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay custom and was born or domiciled in Federation or in Singapore.

Islam came to Malaysia early but was established in Malacca in the 14th century. Before the coming of Islam the Malays followed the customary law which was influenced to a certain extent by Hindu concepts but after the Malay rulers and the people embraced the Islamic religion, several attempts were made to modify the Malay customs so as to conform to Islam and to adopt the Islamic Law. The process can be seen in the various versions of the Malacca Law - the *Risalat Hukum Kanun* or the *Undang-Undang Melaka*.⁴⁴

Islamic Law than was the law of the Land in Malaysia before the coming of the British. The school of law that was followed was the Shafiee school which is the dominant school not only in Malaysia but also in Indonesia, Phillipines and states of Indocina. In the case of *Shaikh Abd. Latif other v. Shaikh Elias Bux*⁴⁵ Braddel C.J. in his judgement said.

Before the first treaties the population of these states consisted almost solely of Mohammadan Malays with a large industrial and mining Chinese in their midst. The only law at that applicable to malays was Mohamedan modified by local customs.

The Court of Appeal of the Federal Malay States held in *Ramah v. Laton*⁴⁶ that Muslim Law is not foreign Law but local law and the law of the land. The court must take judicial notice of it and must propound the law. In the various treaties entered between the malay rulers of the various states and the British under which the Malay Rulers agreed to accept the advice of the British it was expressly provided that this should not apply in questions touching the Malay religion and custom.

When the Federal Council was first set up in 1909, Article 9 of the agreement provided as follows:

Law passed or which may here after be passed by the state Council shall continue to have full force and effect in the states except in so far as it may be repugnant to the provision of any law passed by the Federal Council and question connected with Mohammedian religion, pension, political pensions, native chief and penghulus and often questions which in the opinion of the prerogatives of any of the Rulers or which for other reasons he considers shall properly be dealt with by the state Councils shall be exclusively reserved to the state Councils.⁴⁷

Neither this provision nor any other provision in the agreement empowered the Federal Council to pass law at all. It was impliedly assumed that laws passed by the Federal Council would be binding on each state for the fact that the Malay Rulers had conferred their law making powers for their states on the Council. In the federation of Malaya Agreement 1948, the power of the Federal Legislative Council to make laws was expressly set out.⁴⁸ Clause 100 of the agreement provided that the Council of State established in each state shall have power to pass laws on

- a) any subject including the muslim religion or the custom of the malays other than those in respect to which the legislative Council has power under clause 48 to pass law and
- b) any other subject in respect of which by virtue of a law made under clause 48 such Council of State is for the time being authorised to pass laws.

Despite these clauses however we find that in all the Malay States the British did directly or indirectly interfere with Muslim Law and its administration. Indirectly the spread of British influence favoured the introduction of the English Law. Acting on the advice of the British Residents, the Sultan in the states constituting the Federated Malay States enacted a number of laws which adopted the Indian codification of the principles of English Law.⁴⁹ In all these matters, criminal law, evidence, criminal procedure, contract and land, the effect of the legislation was to replace the former Malay Muslim Laws by enactments based on the principles of English Law.

The position of Islam and Islamic Law under the Federal Constitution shows that only a limited Jurisdiction is given to the Syariah and to the Syariah courts. Islam is stated to be the religion of the Federation in Art 3(1) of the Federal Constitution. The Draft Constitution proposed by the Reid Commission had no provision similar to Article 3. It was added only later. The article appears to be primarily intended to declare Islam as the State religion reserving however the right to the non Muslims to practice in peace and harmony their own religion. It is obvious that Article does not purport to make Malaysia, a theocratic state.⁵⁰ "Islamic Law" is not even expressly included in the definition of Law in Art 160 of the Federal Constitution and Art 4 of the Federal Constitution provides that it is the constitution which is the supreme law.

Under the Federal Constitution 1957, matters on Islamic and Family Law including Islamic law relating to succession, testate and intestate marriage, wakaf, zakat and others matter on Islamic personal laws are set out in the state list.⁵¹

Even in regard to the subjects included in the items in the state list there are many Federal Laws which limit the scope and application of Federal Law.

For example in the field of succession, testate & intestate account has to be taken of the Probate and Administration Act⁵² and the Small Estate (Distribution) Act⁵³ with the result that the Kathis are in effect only given the function of clarifying the shares to be allotted to the beneficiaries under Islamic Law. In the field of Criminal Law in particular the jurisdiction of the Syariah Court is very limited. It has jurisdiction only over person professing the religion of Islam and it has only such jurisdiction in respect of offences as is conferred by Federal Law.

In some areas where the Islamic Law should have applied, we find that as a result of the decisions of the civil courts in Malaysia, Islamic law has been displaced or ignored. Thus in *Ainan v. Syed Abu Bakar*.⁵⁴ It was held that the Evidence Ordinance is a statute of general application, thus section 112 of the Ordinance applies in question of legitimacy to the exclusion rule of Islamic law. In *Myriam v Mohamad Ariff*⁵⁵ the court held, that a mother who remarried a stranger is entitled to the custody of her infant child. The High Court in effect reversed the decision of the kathi who had given custody of the children to the father.

Hence, jurisdiction of Syariah courts are rather limited and in several matters, the civil courts do interfere to a certain extent over cases decided by Syariah courts. Apart from that the Federal Constitution also states that religious freedom is guaranteed to all religion, and every person has the right to profess and practice his religion and subject to clause(4) of Art 11 to propagate it and that every religious group has the right to

- a) manage its own religious affairs
- b) to establish and maintain institution for religious charitable purposes and
- c) to acquire and own property and hold it in accordance with the law.

MALAY LANGUAGE

Malay Language is another traditional element in the Malaysian constitution. Before the Second World War, Malay language was widely used for official purpose, such as meetings correspondence and minute writing and also in legislation and judicial proceeding. This was illustrated in a letter dated 11th May, 1914, Sultan of Johor wrote to Sir Arthur Yong, the governor of Singapore,⁵⁶

I have also to request your excellency's acceptance of the principle that Malay and English should be accepted as official languages for use in my courts of Justice and all Departments of my government. In the case of the Malay written language the Jawi character should be given this official recognition.

However, when the British came, as a result of the British Common Law system and the British system of government, the English language was

naturally accepted as the language of administration although Malay language continued to be used in certain system of government activities. For example, according to the Malayan Union Constitution⁵⁷ the official language of the Council of Sultan shall be Malay and English. Clause 67 of the Malayan Constitution states.

The official language of the state Council and Settlement Council is Malay and English but Clause 34 of the Malayan Union Constitution states the official language of the Council of the Malayan Union itself was English.

When the Malayan Union was dissolved the Federation of Malaya Agreement 1948 still retained English and Malay as official language of the Federal Executive Council but anything which was required to be written or reduced into writing must be expressed in the English Language.⁵⁸

Thus, there is the progressive erosion of the official use of the Malay language after the second world war to give way for the sake of convenience and expediency to the supremacy of the English language a condition necessitated by the adoption of the British Common Law system and their system of administration.

When Peninsular Malaysia gained independence in 1957, Article 152 (1) of the Federal Constitution was drafted to give effect that Malay language is the national language of the Federation. It is significance to note that no provision is found in the constitution which says that the Malay language shall be used for official purpose.

"Official purpose" is defined by clause (6) of Act 152 of the Constitution to mean any purpose of the government whether Federal or state and any purpose of a public authority.

In *Merdeka University Berhad v. Government of Malaysia*,⁵⁹ this was an appeal from the decision of the High court. The appellant in this case submitted a petition to the YDPA for an incorporation order for Merdeka University under section 6 of the Universities and University Colleges Act 1971. The Petition was rejected on the ground that since Merdeka University would use Chinese as the medium of instruction and this would be contrary to the national education policy. Furthermore the court held that the rejection was lawful on the ground inter alia if Merdeka University were established it would be a public authority within Art 160 of Fed. Constitution and its purpose would accordingly be an official purpose within Article 152(6). The Appellant appealed and the Federal Court affirmed the decision of the lower court on the grounds that Merdeka University if established would be a public authority within Art 160(2) of the Federal Constitution and accordingly teaching in Chinese as a language of an official purpose is prohibited under Art 152 of the Constitution. Furthermore, since there is no right to use the Chinese language for an official purpose, it was not unconstitutional and unlawful for the government to reject the petition to establish Merdeka University.

In order to justify the issue that the Malay language is to be the national language instead of official language, it can be said that this was intended to fulfill the need for the unification of the various races into one single by means of a common language ie the Malay Language as the lingua franca of this country. This was further emphasized in the National Education Policy⁶⁰ and the Education Act 1961 which stresses the Malay language as the main medium of instruction in Education.

ISSUE ON MALAY PRIVILEGES

In the early treaties between the Malay rulers and the British government, it was found to be unnecessary at that time to include only provision in those treaties in favour of the Malay since the country being a Malay country, question would not arise on the rights and privileges enjoyed by the Malays. According to these treaties, the Malay rulers were required to follow British advice in all matters except Malay custom and Islamic region, as a result Malay rights and privileges has slowly been eroded. The opening of mines and estates together with the open door policy on immigration during the early century has affected the economic status of the Malay. Later, economically and educationally, they would not compete with the immigrant races who came in to work in mines and estates.

After the war, the British Government felt special responsibility towards the immigrant races who had settled in this country. It was pursuance of this policy, that the Malayan Union Constitution was promulgated.⁶¹ The finished product was a perfect blue print of efficient centralized government, which looked like an answer to the pre-war complex decentralization controversies. Its mains features were:

- i) A Malayan Union of the whole Peninsular plus Penang Island.
- ii) A separate government for the Colony of Singapore.
- iii) A governor general over the Malayan Union and the Colony of Singapore. The setting up the these institutions required that the British government should acquire *de jure* jurisdiction in the Malay States.⁶²

Under this constitution, not only was there no mention of the Malay rights and privileges, but also whatever powers was vested upon a British governor assisted by his formalities since the power was vested upon a British governor assisted by his Executive Council and Legislative Council.⁶³ In legal terms, the introduction of the Malayan Union Constitution represented total loss of Malay position but a gain to the immigrant population because of the recognition of their rights by the constitution.⁶⁴

The weight of the Malay protest persuaded the British that they had moved too far and too fast in attempting to dismantle and refashion the old

apparatus of government. After all, the traditional structure depending on rulers, districts officers and headman was basically a Malay structure and could not work properly without Malay cooperation.⁶⁵

However, when the union was replaced by the constitution of the Federation of Malaya Agreement 1948, the Malays regained their special position and standing in this country. Thus, there is special provision as to safeguard the special position of the Malays and the legitimate interest of other communities.⁶⁶ When the country gained independence in 1957, the responsibility was given to YDPA and when Sabah and Sarawak joined the Federation in 1963, the special position of the natives of these states was recognized to be part and parcel of the YDPA prerogative under Art. 153.

Under the Federal Constitution, matters⁶⁷ which is included as Malay privileges are the provision of Articles 89 and 90 i.e. pertaining to Malay reservation land and special provision relating to customary land in Negeri Sembilan and Malacca and Malay holdings in Trengganu. Enlistment of Malays in the Malay Regiment⁶⁸ to the exclusion of non-Malay is authorised by Article 8(5)(f) and this would be considered as part of the Malay privileges.

As a conclusion matters on position on Malay Sultanate, Islamic religion, issue on Malay language and Malay privileges plays a dominant role and these matters can be considered as traditional since it has been practised long before the British colonial administration itself. However, all these provision which has the issue of 'Malay' as the common denominator has undergone several constitutional changes and political developments especially the 1993 constitution amendments which brought out to light the issue on immunity of sovereignty of Malay rulers.

From the time of Munshi Abdullah, there has existed an alternative tradition of Malay thought which was progressive, adaptive and innovative. These were the newly urbanised Malay who once freed from the doctrinal constraints of a fossilised orthodoxy, found that they were able to reinvent themselves. Hence, the 'Melayu Baru' (New Malay) was born. The Melayu Baru views his position in the world rationally. It was the old Malays who introduced the protective devices into the Federal Constitution in a period of uncertainty which came in the wake of 1969 riot now it is the 'New Malays' who wish to revise this constitutional safeguards in order to clarify the position and status of the rulers as well as their own position and status as free citizen. The past may belong to the 'old Malays' but the future belongs to the 'New Malays' who want changes and who are more concerned with the challenge of breaking free from the shackles of psychological bondage but at the same time still preserve their dignity and historical roots.

NOTES

¹Tom Paine, *Rights of Man*, (ed. H. Collins) 1969, cited from E. C.F. Wade and G. Godfrey Philips, *Constitutional and Administrative Law*, Longmans London. p.3

²Under the Malaysian Constitution in the event of any breach of provision under the constitution (example on rights of personal liberties) the sanction would be provided in the documents itself or subjected to certain other related legislations (example the Internal Security Act 1960 (Act 82) or Sedition Act (Act 15).

³J.M. Gullick, *Indigenous Political System of Western Malaya*, Athlone Press, University of London, 1965, p.21.

⁴Rupert Emerson, *Malaysia, A Study in Direct and Indirect Rule*, Macmillan. New York, 1973, p. 7.

⁵*Mighell v. Sultan of Johore (1894) 1 QBD 149 and Duff Development Co. Ltd. v. Government of Kelantan and Another (1924) AC 797.*

⁶Malaya in the 1800s was politically divided. The nine Malay states of Perak, Selangor, Negeri Sembilan, Pahang, Johor, Kelantan, Terengganu, Kedah & Perlis were under varying degrees of British influence. By 1895 just before the federation, Perak, Selangor, Negeri Sembilan and Pahang had accepted British advisors who were in fact the effective rulers while the Malay sultans have lost the substantial part of their powers.

⁷Roland Braddell. *The Legal Status of the Malay State*, Malaya Publishing House, Kuala Lumpur, 1931, p.7.

⁸Malayan Union Gazette G.N. 2/1946.

⁹Clause 16 Malayan Union Order in Council 1946.

¹⁰*Ibid.* Clause 38-46

¹¹*Ibid.* Part VII

¹²*Ibid.* Clause 72

¹³*Ibid.* Clause 27.

¹⁴James de V. Allen, *The Malayan Union*, Southeast Asia studies, Yale University, New Haven, 1961, Ch.1.

¹⁵R.S. Milne and Diane K. Mauzy, *Politics and Government in Malaysia*, Federal Publication, Kuala Lumpur, 1978, p.28.

¹⁶The Federation of Malaya Order in Council 1948 (G.N 5 of 1948).

¹⁷Article 32 of the Federal Constitution.

¹⁸See Muhamed Suffian Hashim (Tun). *An Introduction to the Constitution of Malaysia*, Government Printers, Kuala Lumpur, 1976, p.22.

¹⁹See Art. VII, second part, Law of the Constitution of Johore, Art 39 (Kedah). Art. XI First Part (Kelantan). Article XL (Negeri Sembilan) Art 6, Part II (Pahang): Art. XI First Part (Perak): Art. 39 (Perlis): Art. XIX, First Part Terengganu.

²⁰*Ibid.*

²¹Art. 39 and 40 of the Federal Constitution.

²²Art. 41.

²³Art. 42.

²⁴Art. 44.

²⁵Appointments of judges, chairman and members of service Commissions and certain Heads of Government Department.

²⁶Section 1 of Eighth Schedule to the Federal Constitution.

²⁷Art. 42.

²⁸Clause 38 to 46 of Malayan Union Constitution M.U.G.N. 2/1946.

²⁹Art. 38(6) Federal Consitution.

³⁰Art. 32(1).

³¹(1894) IOB 147.

³²(1924) AC 797.

³³(1931-32) FMSLR 390 Privy Council.

³⁴Also refer to in the case of *Sultan of Johore v. Tengku Abu Bakar & Ors.* (1952) *MLJ* 115.

³⁵Art. 66(4).

³⁶Art. 32(1).

³⁷*New Straits Times*, 19/1/93, "Move to saveguard Rulers dignity". Text from Mahathir Mohamad speech at the tabling of the Constitution (Amendment) Bill 1993 in the House of Parliament in Kuala Lumpur on January 19, 1993.

³⁸Constitutional Amendment 1971 Act A848.

³⁹*Ibid.*

⁴⁰Article 42(12) (a-c), (Ins Act. A848).

⁴¹(1973) 1 *MLJ* 129.

⁴²Appeal of Malaysian cases to the Privy Council was repeal in 1983 by Constitution Act (Amendment) 1980.

⁴³Art. 160 Federal Constitution.

⁴⁴See Liaw Yock Fang, *Undang-undang Melaka (The Laws of Malaka)*, Koninklijk Instituut Voor Taal-, Land-en Volkenkunde, The Hague, Martinus Nijhoff, 1976, for a greater detail of the Risalat Hukum Kanun see chapter 2.

⁴⁵(1915) 1 F.M.S.L.R 204.

⁴⁶(1972) 6 F.M.S.L.R 127.

⁴⁷J. de v. Allen, A.J. Stockwell and L.R. Wright *Collection of Treaties and Other Documents Affecting the States of Malaysia*, 1981 Vol. 2, Oceana Publication, USA, 1981, p.54.

⁴⁸Clause 48 of the Federal Malaya Agreement 1948.

⁴⁹Examples of these laws are the Penal Code of the Straits Settlement. The Evidence Ordinance and The Contract Act.

⁵⁰*Federal Constitution of Malaysia - A Commentary*, Malaysian Current Law Journal, Singapore, 1986, p.13.

⁵¹9th. Schdule, list 11(1)

⁵²Act. 97.

⁵³Act. 98.

⁵⁴(1939) *MLJ* 209.

⁵⁵(1971) 1 *MLJ* 265.

⁵⁶Maxwell & Gibson, *Treaties and Engagement Affecting Malay States and Borneo* Jas Trusco & Sons, Suffolk Lane UK, 1924, p.135.

⁵⁷Clause 44 of Malayan Union Constitution.

⁵⁸Clause 35 of the Federation of Malaya Agreement.

⁵⁹(1982) 2 *MLJ* 243.

⁶⁰*The Razak Report*, Government Printers, Kuala Lumpur. 1956 and *Rahman Talib Report*, Government Printers, Kuala Lumpur, 1960.

⁶¹Malayan Union Gazette No. 2/1946.

⁶²B. Simandjuntak, *Malayan Federalism 1945-1963 - A Study of Federal Problems in a Plural Society*, OUP, London, 1969, see chapter 3.

⁶³Cause 13 of the Malayan Union Constitution which authorizes the setting up of an Executive Council to the governor and Part IV (Clause 16-26) which give powers for the establishment of Legislative Council.

⁶⁴The Malayan Union Constitution proposed a broad - based Malaysian Union Citizen as defined in cause 2 of the Agreement as "a citizen of the union within the meaning of an" order in council or other enactment providing for Malayan Union citizenship".

⁶⁵R.S. Milne and Diane K. Mauzy, *Politics and Government in Malaysia*, p. 29.

⁶⁶Clause 19(1)(f) of the Federation of Malaya Agreement - G.N: 6/1948.

⁶⁷Art. 153 of the Federal Constitution is on reservation of quotas in respect of services permits, etc for Malays and natives of the states of Sabah and Sarawak.

⁶⁸Malay Regiment Enactment 1933 FMS. Cap 42.